No. 94-1414

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

THE MEAD CORPORATION,
Petitioner,

v.

BEAZER EAST, INC.,
Respondent.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Third Circuit

REPLY BRIEF FOR PETITIONER

ALAN M. WISEMAN
Counsel of Record
THOMAS A. ISAACSON
HOWREY & SIMON
1299 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 783-0800

JOHN H. BINGLER
GEORGE P. FAINES
THORP, REED & ARMSTRONG
One Riverfront Center
Pittsburgh, PA 15222
(412) 394-7711

Counsel for Petitioner
The Mead Corporation

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REPLY BRIEF FOR PETITIONER

I. INTRODUCTION

The Mead Corporation submits this reply brief to address certain new arguments raised in the opposition brief filed by Beazer East, Inc. Mead's Petition for a Writ of Certiorari demonstrates the national importance of resolving the split among the circuits and clarifying the law regarding the enforcement of a release/hold harmless agreement to bar an action under CERCLA. Conceding the correctness of Mead's position that section 107(e)(1) does allow such agreements, Beazer instead raises the new suggestion that the decision of the Third Circuit below did not require any assessment of what sort of agreement would satisfy section 107(e)(1) of CERCLA. According to Beazer, the Third Circuit ignored the governing federal statute and merely undertook to interpret the 1974 Purchase Agreement by which Beazer's predecessor acquired the Woodward Facility from Mead. But, it is not possible

to determine the legal effect of an agreement without knowing the legal standard against which the parties' intent is measured. Therefore, Beazer cannot sidestep the manifest question presented by this Petition, namely: can a release/hold harmless agreement satisfy section 107(e)(1) of CERCLA even though it may not meet the stricter standard of an indemnity agreement? Because of the significance of that issue to the extensive nationwide federal court litigation over hazardous waste clean-ups, Mead respectfully submits that the Petition for a Writ of Certiorari should be granted.

II. THE RESOLUTION OF THIS CASE RESTS UPON AN ISSUE OF FEDERAL STATUTORY LAW

Beazer concedes every important predicate of Mead's Petition: that there is a distinction between the defense of release/hold harmless and a cause of action for indemnity; that Alabama -- like most states -- imposes a higher burden on the latter; and that Mead's Cross-Motion for Summary Judgment raised an affirmative defense of release, not a claim for indemnity. Nonetheless, Beazer still argues without explanation that the Third Circuit correctly analyzed the Purchase Agreement under the indemnity standard. The only possible basis for such a conclusion would be that section 107(e)(1) requires an indemnity analysis, regardless of state law. Yet, that focus on the federal statute is precisely the conclusion Beazer seeks to avoid.

Beazer fundamentally misstates the posture of this Petition when Beazer argues that Mead relies on the assumption that paragraph 4(c) of the Purchase Agreement transferred this CERCLA liability to Beazer. (Beazer Opp. at 6). Although that is the ultimate goal sought by Mead, at this stage -- where Mead merely

seeks to correct the governing legal standard -- Mead's Petition makes no such assumption. An assessment of whether paragraph 4(c) transferred this liability inevitably depends on the standard under which a court interprets that paragraph. Applying the inappropriately demanding indemnity standard, the Third Circuit held that paragraph 4(c) lacks the requisite clarity to create a duty for Beazer to indemnify Mead. *Beazer East, Inc. v. The Mead Corp.*, 34 F.3d 206, 219 (3d Cir. 1994).[1] As Beazer essentially concedes, Mead's defense to Beazer's CERCLA claims did not seek indemnity. Thus, there is no doubt and Beazer does not deny, that the Third Circuit should not have subjected Mead's affirmative defense to the exacting scrutiny of indemnity law.

The ultimate issue before the Third Circuit was a simple question of federal law, *i.e.*, did paragraph 4(c) of the Purchase Agreement afford Mead a defense under section 107(e)(1) to Beazer's CERCLA claims? The Third Circuit initially determined that it should look to the Alabama law of indemnity and not the Alabama law of release/hold harmless on the subordinate question of how to interpret the Purchase Agreement. That decision, which is the focus of this Petition, was mani-

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[1] Had the Third Circuit ruled that the Purchase Agreement unambiguously transferred the liability to Mead then the legal standard would not have mattered. But, by finding the Agreement ambiguous under the indemnity standard, the Third Circuit held that the Agreement not only failed the legal standard but Mead could not even introduce parol evidence to clarify the ambiguity. The severity of that result illustrates the importance of the Third Circuit's decision to impose the indemnity standard. By that retroactive denial of Mead's contract rights, Mead was forever foreclosed from proving that it, in fact, bargained for a transfer of CERCLA liabilities to Beazer.

festly wrong as a matter of federal law. Whether a release is effective to bar a federal claim is a question of federal law. *See Dice v. Akron, Canton & Youngstown Railroad*, 342 U.S. 359 (1952). While state law may determine the legal meaning of a release, a court must look to federal law in deciding whether that legal meaning is sufficient to release a federal claim. Here, section 107(e)(1) -- not Alabama law -- determines what sort of state law release, hold-harmless or indemnity agreements are effective to transfer CERCLA liabilities.

An analysis of Mead's affirmative defense to Beazer's CERCLA claims logically requires three steps: (1) does section 107(e)(1) permit parties to transfer CERCLA liability through an indemnity, a release/hold harmless, or both; (2) what clarity of expression/intent does Alabama law require in order for an agreement to create a release/hold harmless or to create an indemnity; and (3) with what clarity of expression does paragraph 4(c) of the Purchase Agreement express an intent by Beazer to assume CERCLA-type liabilities? Having decided that the 1974 Purchase Agreement lacked the necessary clarity of expression that Alabama law demands to create a duty to indemnify, the Third Circuit only could deny Mead's Cross-Motion for Summary Judgment if the court concluded, as it evidently did, that section 107(e)(1) required it to find an indemnity. Otherwise, the court also would have decided whether the Purchase Agreement effectuated a release. When Beazer tries to remove the section 107(e)(1) issue it becomes impossible to explain why Mead's affirmative defense was tested under the indemnity standard.

One cannot divorce the process of deciding the legal effect of paragraph 4(c) from a selection of the relevant legal standard. Beazer tries to do so by argu-

ing that the Third Circuit simply faced a question of contract interpretation. But the Third Circuit continuously made clear that it was holding only that paragraph 4(c) did not have the necessary clarity of expression to create an indemnity, 34 F.3d at 215-19, an explicit determination that that is the governing legal standard. The Third Circuit never considered whether that paragraph was sufficiently clear to create a release or assumption of liability as it surely would had it interpreted section 107(e)(1) to enforce such agreements.

Beazer seeks to avoid the direct federal law implications of the Third Circuit's decision by suggesting that the Third Circuit made an even more obvious blunder of state law in thinking that Mead's Cross-Motion was a claim for indemnity. It is not possible to read Mead's Cross-Motion for Summary Judgment on Mead's affirmative defense and conclude that Mead was basing its argument on Alabama indemnity law. Mead extensively briefed the Alabama law of release/hold harmless and demonstrated how its Cross-Motion on its affirmative defense was not a claim for indemnity. The Third Circuit's decision to rely upon Alabama indemnity law certainly was not founded on anything Mead argued in its Cross-Motion but, instead, was an apparent determination by that Panel of what section 107(e)(1) requires. The fact that the Third Circuit did not expressly so state does not make its decision any less erroneous.

The Third Circuit was, of course, aware of the elementary difference between an affirmative defense (such as release/hold harmless) and a cause of action (such as indemnity). That distinction so pervades legal rules of pleading and proof that one cannot seriously suggest that the Third Circuit looked to Alabama in-

demnity law out of simple ignorance of the difference between a plaintiff and a defendant, and their respective burdens. To suggest, as Beazer must, that the Third Circuit looked to the wrong state law not because it misinterpreted section 107(e)(1) but, instead, because the Third Circuit did not know the difference between a defense and a cause of action, implies that the Third Circuit committed a far worse blunder than any mistake ever attributed to that decision by this Petition. A respondent cannot avoid the direct implications of a misinterpretation of a federal statute by suggesting that the Third Circuit committed an even grosser error of state law so as to make the decision below nonsensical.

Regardless of what the Third Circuit did or did not expressly state, the fact remains that, in applying section 107(e)(1) of CERCLA to this Purchase Agreement, the Third Circuit required that Mead satisfy the higher indemnity standard. As such, if left intact, the decision below would stand for the erroneous proposition that federal courts should look only to state indemnity law in reviewing affirmative defenses to CERCLA claims. Because section 107(e)(1) does not solely direct a court to state indemnity law, the decision below is an incorrect interpretation of that statute.

Beazer argues, in the alternative and without citation to any state law, that perhaps the relevant state law requires an "unambiguous expression of intent" (Beazer Opp. at 8) regardless of whether the underlying agreement is an indemnity, or a release, etc. The only possible basis for such an argument is to create a new federal standard of CERCLA contract interpretation since nothing in Alabama law, or that of any other state, supports such a fusion of those distinct concepts. Instead, like other states, as shown in the unanimous

case law, Alabama imposes a higher standard for indemnity agreements than for releases/hold harmless agreements. (*See* Mead Petition at 17). Since Mead's affirmative defense undeniably arose under state release/hold harmless law, the only plausible reason that the Third Circuit rejected Mead's arguments and looked to state indemnity law is that it believed that section 107(e)(1) demanded such a heightened scrutiny.

III. THE IMPORTANT ISSUE OF FEDERAL STATUTORY LAW PRESENTED BY THIS CASE WARRANTS REVIEW BY THE COURT

The Third Circuit's decision below is at odds with decisions of three other circuit courts. (Mead Petition at 14-16). Combined with the similarly erroneous decision of the Fifth Circuit in *Joslyn Mfg. Co. v. Koppers Co.*, 40 F.3d 750, 758 (5th Cir. 1994), the decision below is part of a manifest split in the circuits on the meaning of section 107(e)(1) of CERCLA.

By itself, that split and confusion in the law warrants clarification from the Court. Moreover, because of the significant implications of such confusion and uncertainty for the drafting of environmental liability clauses in real estate contracts, it is especially important to have a clear rule. Although parties may choose the governing state law, they often cannot predict in which circuit any eventual litigation will land.[2] Thus, they are

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[2] Even though this case concerns a site located in Alabama and a Purchase Agreement governed by Alabama Law, the district court denied a motion to transfer the case to Alabama.

faced with great uncertainty regarding the applicable legal standard.[3]

The significant constitutional implications of the Third Circuit's misinterpretation of section 107(e)(1) are a further reason to grant the Petition. Beazer's claim that Mead has "waived" any constitutional infirmity misconceives Mead's argument. (Beazer Opp. at 12). Mead is not arguing that this section of CERCLA is unconstitutional. Rather, the Third Circuit's misinterpretation of section 107(e)(1) should be corrected for the additional reason that, otherwise, there would be a serious constitutional issue. In any event, since Beazer apparently concedes that section 107(e)(1) allows hold harmless agreements, the constitutional concerns are an additional, but not a necessary, ground for rejecting the Third Circuit's statutory construction.

Beazer notes that the retroactivity provision of CERCLA has withstood constitutional challenge in the circuit courts. (Beazer Opp. at 11-12). Those challenges related to the imposition of retroactive liability, not to

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[3] Beazer's claim (Beazer Opp. at 11 n.10) that parties have learned to draft contract language subsequent to CERCLA ignores the fact that many of the hotly contested contract claims/defenses in CERCLA cases concerned contracts drafted *after* the 1980 enactment of CERCLA. *E.g., Fisher Development Co. v. Boise Cascade Corp.*, 37 F.3d 104 (3d Cir. 1994) (agreement entered in 1981); *Commander Oil Corp. v. Advance Food Service Equipment*, 991 F.2d 49 (2d Cir. 1993) (agreement entered in 1987); *AM International, Inc. v. International Forging Equipment*, 982 F.2d 989 (6th Cir. 1993) (agreement entered in 1984); *Niecko v. Emro Marketing Co.*, 973 F.2d 1296 (6th Cir. 1992) (agreement entered in 1987); *Mardan Corp. v. C.G.C. Music, Ltd.*, 804 F.2d 1454 (9th Cir. 1986) (agreement entered in 1981). Of course, many other contracts drafted both before and after 1980 are still in active litigation in CERCLA cases.

the question of whether the parties may contractually allocate that liability. The Third Circuit's limitation on Mead's right to obtain and enforce a release of liability raises a very different constitutional problem from those discussed in all of the cases cited by Beazer.

Beazer cannot justify the decision below on the ground that it promotes CERCLA's objective of making polluters pay. (Beazer Opp. at 12-13). Under section 107(e)(1), that objective is superseded where there exists a private contractual allocation of liability. By subordinating the sanctity of Mead's contract with Beazer to the court's desire to impose its notion of equity among alleged polluters, the decision below is flatly at odds with that overriding goal of CERCLA.

Beazer's claim that courts should not enforce section 107(e)(1) because doing so would discourage voluntary clean-ups, (Beazer Opp. at 11-12), is wrong. Like any statute, CERCLA should be applied as written, and should not be judicially rewritten to achieve some other objective. Beazer's argument also relies on the incorrect premise that if Beazer had not voluntarily cleaned up the Woodward site the EPA would have sued Mead. Since Beazer was and is a wealthy current owner of the property, and CERCLA makes Beazer severally liable for all clean-up costs, EPA would have had no reason to reach out and try to bring an action against Mead. It is not EPA's practice to increase its burden in litigation by suing both current and former owners in the same action. Usually the current owner must bring a contribution action against any former owners. In such cases, as here, the former owners' defense based on a prior contract presents a question of release, not indemnity.

It also is inappropriate for Beazer to defend an erroneous interpretation of section 107(e)(1) by claiming that, as a "responsible corporate citizen," it "voluntarily" chose to clean up the Woodward site. As expressly alleged in Beazer's amended complaint and found by the court below, (App. A7), the clean-up resulted from an Administrative Order on Consent imposed by EPA. Moreover, although the years of litigiousness, recalcitrance and foot-dragging by Beazer -- for which it was repeatedly fined by EPA -- are beyond the scope of this Petition, Beazer certainly has not created a record that would entitle it to the self-congratulatory title of a "responsible corporate citizen." Fifteen years after the passage of CERCLA, Beazer is still years away from even beginning to clean up the Woodward site. This Petition should be resolved on the substance of the interpretation of section 107(e)(1) of CERCLA, not on a party's characterization of its alleged good conduct.

CONCLUSION

For the foregoing reasons and those set forth in The Mead Corporation's Petition, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

JOHN H. BINGLER
GEORGE P. FAINES
THORP, REED & ARMSTRONG
One Riverfront Center
Pittsburgh, PA 15222
(412) 394-7711

ALAN M. WISEMAN
Counsel of Record
THOMAS A. ISAACSON
HOWREY & SIMON
1299 Penn. Ave., N.W.
Washington, D.C. 20004
(202) 783-0800

Counsel for Petitioner
The Mead Corporation

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